

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs April 19, 2006

MILTON K. PERKINS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2001-A-534 J. Randall Wyatt, Jr., Judge

No. M2005-01762-CCA-R3-PC - Filed May 3, 2006

The petitioner, Milton K. Perkins, appeals from the Davidson County Criminal Court's dismissal of his petition for post-conviction relief from his guilty plea to aggravated robbery, a Class B felony, for which he received a twenty-year sentence. He contends that he received the ineffective assistance of counsel, rendering his guilty plea unknowing and involuntary. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which DAVID H. WELLES and JOHN EVERETT WILLIAMS, JJ., joined.

David M. Hopkins, Nashville, Tennessee, for the appellant, Milton K. Perkins.

Paul G. Summers, Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Victor S. (Torry) Johnson, III, District Attorney General; and Kathy Morante, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case arises from the petitioner's conviction for aggravated robbery of a gas station. A Davidson County grand jury indicted the petitioner on one count of aggravated robbery. On January 23, 2002, the Davidson County Criminal Court accepted the petitioner's guilty plea to one count of aggravated robbery and sentenced the petitioner as a Range III, persistent offender to twenty years to be served consecutively to a Texas sentence.

At the post-conviction hearing, the petitioner's post-conviction attorney told the trial court that the petitioner was serving a forty-year sentence in the Texas Department of Correction and that the petitioner was not able to appear for the post-conviction hearing. The post-conviction attorney submitted the petitioner's affidavit at the hearing. In the petitioner's affidavit, the petitioner stated that he met with his trial attorney once before he entered his guilty plea and that he also met with his

attorney's associate once. He stated he told his attorney he was serving a forty-year sentence in Texas and asked her what kind of a deal she could get for him because he wanted to return to Texas where he had an appeal pending. He stated he told his attorney he would accept a deal between ten and fifteen years concurrent to his forty-year sentence. He stated he was willing to enter a guilty plea because his criminal record was bad and another conviction would not hurt his record.

The petitioner stated that at his next court date, his attorney told him she had spoken with the assistant district attorney, and the assistant district attorney did not want to offer a plea deal because the victim was willing to testify. He stated his attorney said the assistant district attorney had told him that the victim had identified the petitioner from a lineup and that the state was seeking life without parole under the "three strikes" law. He stated his attorney later told him that she was able to get the state to agree to a twenty-year sentence and that the sentence would have to be consecutive to his Texas sentence because he was on parole at the time he had committed the present offense. He stated, "I told [the attorney] that I was unsure of the Tennessee law and that just didn't sound right and I wasn't sure what exactly it meant." He stated that his attorney told him she was willing to defend him at the trial but that he was facing life without parole if he went to trial. He stated he was overwhelmed by the possibility of life without parole and felt compelled to take the plea deal. He stated his attorney did not tell him he had to serve his Texas sentence before he served his Tennessee sentence.

The petitioner stated that after he was sentenced, he received copies of the police report and other documents which his attorney had acquired through her investigation. He stated he went through the documents and learned the victim was a male. He stated he then called his family and friends and was able to determine his whereabouts on the date and time of the robbery. He stated his brother and ex-girlfriend could have been alibi witnesses, because he was with them at a downtown nightclub at the time of the robbery. He stated that he tried to contact his attorney to tell her about the alibi witnesses and ask her to file a motion to withdraw his guilty plea but that he was unable to contact her.

The petitioner stated that less than one week after entering his plea, he was transferred back to Texas where he wrote a motion to withdraw his guilty plea. He stated he mailed it to his attorney, received a response back from her asking if he really wanted to withdraw the plea, and responded by directing his attorney to file the motion. He stated his attorney told him that the trial court would not hear the motion without the petitioner being present and that she would request the state to extradite the petitioner back to Tennessee. He stated that ten months later he received a letter from his attorney saying the state would not extradite him and that he should file a petition for post-conviction relief. He stated that if he had known the "three strikes" law was being improperly applied or if his attorney had more thoroughly investigated his case, he would not have pled guilty and would have gone to trial.

The petitioner's attorney testified that she had been practicing criminal law for approximately ten years and that she was appointed to represent the petitioner. She said the petitioner met with another attorney from her office first. She said that before she met with the petitioner, she received

a letter from him asking her when he would receive a plea offer because he was in a hurry to return to Texas. She said that at her first meeting with the petitioner, the petitioner again asked her what kind of plea bargain he could get, that she gave him a copy of the discovery, and that they discussed the case for approximately thirty minutes. She said that on the next court date, they again discussed the case. She said that the case was reset a couple more times and that on the day the petitioner entered his guilty plea, she went over the petition to enter a guilty plea with the petitioner and explained his rights to him. She said she explained the service percentage and the fact that the sentence would be served consecutively to his Texas sentence. She said the petitioner understood his guilty plea and knowingly and voluntarily entered the plea. She said that she did not have any recollection of the victim's gender being an issue and that the case involved the robbery of a male at a gas station. She said that she talked to the petitioner about the time and the place of the robbery and that the petitioner never raised an alibi defense.

On cross-examination, the petitioner's attorney testified she received a letter from the petitioner several months after his guilty plea telling her about alibi witnesses and about wanting to withdraw his plea. She said she sent a letter to the petitioner asking if he really wanted to withdraw his plea because he would face a greater sentence if he went to trial. She said she told the petitioner that the time had run for him to withdraw his plea and that his only avenue was to seek post-conviction relief. She said that the petitioner entered his plea in January 2002 and that she did not receive the petitioner's letter asking to withdraw his plea until June 2002. She said the petitioner did not tell her that his brother and ex-girlfriend could be alibi witnesses until after he sent her a fifth letter from Texas. She said that she did not know if the state ever filed a notice of intent to seek life without parole but that her notes reflected the assistant district attorney said she would file the notice if they went to trial. She said the petitioner would have qualified as a "three strikes" offender because he had three prior robberies, a burglary, and one or two other felony convictions. She said she discussed mistaken identity and cross-cultural identification with the petitioner as possible defenses. She said she told the petitioner that because he was on parole out of Texas when he committed the present offense, Tennessee required his sentence to be served consecutively to his Texas sentence. She acknowledged that they may have discussed that Texas might do something with the sentences to run them concurrently but that there was no agreement with Texas and that Tennessee law required them to be served consecutively.

Following the post-conviction hearing, the trial court dismissed the petition for post-conviction relief. The trial court found that

the Court is of the opinion that [the attorney] represented the Petitioner in a competent and thorough manner. The Court does not find sufficient evidence to support the Petitioner's claim of ineffective assistance of counsel. The Court is of the opinion that [the attorney] fully appraised the Petitioner of the fact that he would be required to serve the sentence for the Aggravated Robbery conviction consecutively to his forty year Texas sentence. The Court is of the opinion that [the attorney] properly investigated the facts of the case

and properly evaluated the strengths and weaknesses of the State's case against the Petitioner. The Court is of the opinion that [the attorney] advised the Petitioner of the evidence against him, and counseled him about the pros and cons of accepting the plea. The Court is of the opinion that [the attorney] competently counseled the Petitioner so that he was able to enter into the plea agreement knowingly, voluntarily, and intelligently.

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456-57 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457. Post-conviction relief may only be given if a conviction or sentence is void or voidable because of a violation of a constitutional right. T.C.A. § 40-30-103.

The petitioner contends that he entered his guilty plea unknowingly and involuntarily because his attorney failed to consult with him about the case. He asserts his plea was unknowing because he was not advised he must serve his entire forty-year sentence from Texas before he began serving his twenty-year sentence from Tennessee. He asserts he was misled as to the victim's gender and felt a female victim would have received more sympathy from a jury than a male victim. He asserts that his attorney failed to provide him with discovery in this case until after his guilty plea and that because of the failure, he could not provide his attorney with potential alibi witnesses until after the plea. He asserts his attorney falsely told him the state had filed a "three strikes" notice, when in fact it had not. He asserts he was coerced into pleading guilty because his attorney erroneously advised him that if he did not accept the twenty-year offer, he would be sentenced to life imprisonment. He asserts his attorney did not timely file a motion to withdraw his guilty plea. He asserts he would not have entered his guilty plea had he received the effective assistance of counsel and would have proceeded to trial.

The state asserts the petitioner stated in his affidavit that he was informed that Tennessee law required his sentence to be served consecutively to his Texas sentence. The state asserts the information regarding the victim's gender is immaterial. The state asserts the attorney accurately explained the consequences of going to trial and did not inform him about the consequences to intimidate him. The state asserts that the petitioner, not his attorney, was untimely in filing a motion to set aside the plea and that this allegation is irrelevant to the ineffective assistance of counsel claim because it occurred long after the petitioner pled guilty.

Under the Sixth Amendment, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 842-44 (1993). In other

words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. The Strickland standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989). When a petitioner claims that the ineffective assistance of counsel resulted in a guilty plea, the petitioner must prove that counsel performed deficiently and that but for counsel's errors, the petitioner would not have pled guilty and would have insisted upon going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985). Failure to satisfy either prong results in the denial of relief. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. Further, the court stated that the range of competence was to be measured by the duties and criteria set forth in Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974), and United States v. DeCoster, 487 F.2d 1197, 1202-04 (D.C. Cir. 1973). Baxter, 523 S.W.2d at 936. Also, in reviewing counsel's conduct, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065.

I. CONSECUTIVE SENTENCE

The petitioner contends his attorney was ineffective for failing to advise him that he must serve his entire forty-year sentence from Texas before he began serving his twenty-year sentence from Tennessee. The state responds that the petitioner contradicts this allegation through his own statement and that he confirmed his attorney's testimony that he was informed about the consecutive sentencing.

The trial court addressed this issue in its order denying the petition for post-conviction relief. The trial court stated that

The Court finds that [the attorney] informed the Petitioner that Tennessee law required that the sentence he would received [sic] for the conviction of Aggravated Robbery to be served consecutively to his current sentence in Texas, because he committed the offense while on parole out of Texas. The Court finds that the Petitioner acknowledged this fact in his signed statement The Court is of the opinion that the Petitioner was fully appraised of the fact that he would be required to serve his sentence consecutively to his forty year Texas sentence. The Court is of the opinion that this allegation is without merit.

Initially, we note that the petitioner failed to include a copy of the guilty plea hearing transcript in the record. However, the plea petition form was entered as an exhibit at the post-conviction hearing. The plea petition states the petitioner was entering a plea to aggravated robbery with a twenty-year sentence to be served at forty-five percent “consecutive to Texas.” The petitioner acknowledged in his affidavit that he discussed consecutive sentencing with the attorney. He stated that

[The attorney] told me that according to Tennessee law that if a person was on parole, probation or out on bond and they got another case/conviction that the new sentence would have to be ran [sic] consecutive to the original one. I told [the attorney] that I was unsure of the Tennessee laws and that just didn’t sound right and I wasn’t sure what exactly it meant.

The petitioner’s attorney testified she explained to the petitioner the sentence would be served consecutively to his Texas sentence. The trial court accredited the testimony of the petitioner’s attorney. We conclude the petitioner has failed to prove by clear and convincing evidence that his attorney’s performance was deficient, and the petitioner is not entitled to relief on this issue.

II. FAILURE TO PROVIDE DISCOVERY

The petitioner asserts that his attorney was ineffective for misleading him about the gender of the victim. The petitioner also asserts that his attorney was ineffective for failing to provide him with discovery before he entered his plea and that the failure caused him to be unable to inform his attorney about two alibi witnesses until after his plea. The petitioner asserts that he learned the date and time of the offense after reading discovery and that he was with his ex-girlfriend and brother at the time the offense occurred. The state asserts the gender of the victim is immaterial and not a defense to aggravated robbery.

When a petitioner contends that his trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing. Black v. State, 794 S.W.2d 752, 757-58 (Tenn. Crim. App. 1990). This is the only way for a petitioner to prove by clear and convincing evidence that “the failure to discover or interview a witness inured to his prejudice” or that the failure to “call the witness to the stand resulted in the denial of critical evidence.” Id. at 757.

The trial court addressed this issue in its order denying the petition for post-conviction relief. The trial court stated that

The Court finds that the indictment names the victim as Abraham Abby. The Court finds that the Petitioner asserts that [the attorney] believed that the victim was a female named “Abby.” The Court is initially of the opinion that [the attorney] adequately investigated the

facts of the case. The Court is also of the opinion that the gender of the victim was immaterial in the prosecution of the case, as well as the Petitioner's decision to enter a plea of guilty. The Court is of the opinion that this issue is without merit.

. . . .

. . . The Court is of the opinion that [the attorney] properly investigated the facts of the case and properly evaluated the strengths and weaknesses of the State's case against the Petitioner.

The record reflects that the petitioner's attorney testified that on the petitioner's first court date, she gave the petitioner a copy of discovery and discussed the case with the petitioner for thirty minutes. She stated that on the next court date after the petitioner had time to review the discovery, they discussed what was provided in the discovery. She said that she had no recollection of the victim's gender being in question and that the case involved the robbery of a male at a gas station. She also said that they talked about the time and place of the robbery and that an alibi defense "never presented itself." Additionally, we note the record is devoid of any testimony from the petitioner's brother or ex-girlfriend. We conclude that the petitioner has failed to prove by clear and convincing evidence that his attorney's performance was deficient and that he is not entitled to relief on this issue.

III. "THREE STRIKES" NOTICE

The petitioner contends he received the ineffective assistance of counsel because he was misled by his attorney to believe that the state was seeking life imprisonment without parole and that the state had filed a "three strikes" notice against him. He asserts he was coerced and threatened into pleading guilty by his attorney's telling him he faced life without parole if he went to trial. The state asserts the attorney's advice was an accurate explanation of the consequences the petitioner faced if he went to trial. The state asserts the petitioner had an extensive criminal history including three robbery convictions, one burglary conviction, and one or two other felony convictions, which classified him as a "three strikes" offender. The state asserts the attorney was performing her duty by informing the petitioner about the possible life sentence and was not intimidating the petitioner.

The trial court addressed this issue in its order denying the petition for post-conviction relief. The trial court stated that

The Court finds that [the attorney] believed that based on the Petitioner's extensive prior criminal history, he qualified as a three strike life offender, and that the State would be filing such a notice if the Petitioner proceeded to trial. The Court is of the opinion that [the attorney] accurately explained the consequences of the Petitioner proceeding to trial. The Court is of the opinion that this accurate

statement was used to allow the Petitioner to make an informed decision, and not to intimidate or coerce the Petitioner into entering a guilty plea. The Court is of the opinion that this issue is without merit.

Tennessee Code Annotated section 40-35-120 is the repeat violent offenders or “three strikes” statute. The relevant subsection states:

The court shall sentence a defendant who has been convicted of any offense listed in subdivision (b)(1), (c)(1) or (d)(1) to imprisonment for life without possibility of parole if the court finds beyond a reasonable doubt that the defendant is a repeat violent offender under subsection (a).

T.C.A. § 40-35-120(g). The statute lists the offenses required for a defendant to be sentenced as a repeat violent offender. See T.C.A. § 40-35-120 (a)-(d).

The record reflects the petitioner was charged with aggravated robbery in this case and was serving a forty-year sentence out of Texas on another conviction. The record reflects that he had three robbery convictions, a burglary conviction, and one or two other felony convictions and that he was a Range III, persistent offender. The petitioner’s attorney testified the petitioner qualified as a “three strikes” offender, and the trial court accredited the testimony of the attorney. We conclude the petitioner has failed to prove by clear and convincing evidence that his attorney’s performance was deficient, and the petitioner is not entitled to relief on this issue.

IV. MOTION TO WITHDRAW GUILTY PLEA

The petitioner contends that he received the ineffective assistance of counsel because his attorney did not timely file a motion to withdraw his guilty plea. The state replies that this allegation is irrelevant because the events occurred long after the petitioner pled guilty. The state argues that it had no bearing on the petitioner’s decision to plead guilty. The state also asserts the petitioner, not the attorney, was untimely in filing the motion.

The trial court addressed this issue in its order denying the petition for post-conviction relief. The trial court stated that

The Court is of the opinion that this allegation pertains to events that took place after the Petitioner [pled] guilty, and had no impact on the Petitioner’s decision to plead guilty. Nevertheless, the Court finds that [the attorney] received the Petitioner’s letter asking that his plea of guilty be set aside in June of 2002, approximately four months after the Petitioner [pled] guilty on January 23, 2002. The Court is of the opinion that [the attorney] had no fault in receiving the

Petitioner's request approximately ninety days after the judgment of conviction had become final. The Court finds no merit in the Petitioner's allegation that the fault lies with [the attorney] in the Petitioner failing to have his guilty plea set aside.

A defendant may attempt to withdraw a guilty plea before sentencing or, "to correct manifest injustice," after sentencing but before the judgment becomes final. Tenn. R. Crim. P. 32(f). A trial court's judgment as a general rule becomes final thirty days after its entry. See State v. Pendergrass, 938 S.W.2d 834, 837 (Tenn. 1996). After the trial court loses jurisdiction, generally it retains no power to amend a judgment. Id. The judgment for the aggravated robbery conviction is not included in the record before us. However, the record reflects the petitioner pled guilty on January 23, 2002, to an agreed sentence of twenty years to be served as a Range III, persistent offender to be served consecutively to his Texas sentence.

The petitioner's attorney testified she received a letter from the petitioner in June 2002 asking her to file a motion to withdraw his guilty plea. The trial court accredited the testimony of the attorney and found the petitioner did not request his attorney to withdraw the plea until more than ninety days after the judgment had become final. We conclude the petitioner has failed to prove by clear and convincing evidence that his attorney's performance was deficient, and the petitioner is not entitled to relief on this issue.

CONCLUSION

Based on the foregoing and the record as a whole, we affirm the judgment of the trial court.

JOSEPH M. TIPTON, JUDGE